No. 12929

IN THE

United States
Court of Appeals
For the Ninth Circuit

NORVELL MILBERN BICKFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

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STATEMENT

This is an Appeal from an order of the United States District Court for the District of Arizona denying Appellant's petition for release from illegal confinement pursuant to provisions of Title 28, U.S.C. Section 2255.

The jurisdictional statement in the Appellant's brief correctly shows the jurisdiction of the District Court and of this Court.

Plaintiff's brief contains a substantially correct statement of the record in the case and contains sufficient information for the determination of the issues raised by Appellant.

We, therefore, do not find it necessary to make any additional statements, but in the course of the argument we will refer to the record when we deem it necessary.

QUESTIONS PRESENTED

1. Did the Appellant enter a plea of guilty to the second count of the indictment?
2. Was the Appellant denied effective assistance of counsel?
3. Did the United States District Court for the District of Arizona have jurisdiction of the offense alleged in the second count?
4. Was the judgment and sentence imposed by the Court void because of indefiniteness, ambiguity and uncertainty?

ARGUMENT

In reply to Appellant's argument we will discuss the points raised in the same order in which they appear in Appellant's brief.

POINT 1.

DID THE APPELLANT ENTER A PLEA OF GUILTY TO THE SECOND COUNT OF THE INDICTMENT?

One Donald Webster, Jr., a member of the Bar of Arizona was appointed to represent defendant. (T.R. 4). Subsequent thereto, on April 2, 1947, Appellant, with his counsel, appeared in Court and counsel for Appellant moved for a dismissal of Count 2, which motion was argued and submitted. (T.R. 5). Subsequently, on April 14, 1947, an order was entered denying Appellant's motion to dismiss. (T.R. 6). There is nothing in the record to show that Appellant or his counsel was present at the time of the entry of this order.

In support of this first point Appellant lays considerable stress upon the fact that defendant was absent when a motion to dismiss was denied and when the time was set for his entering his plea. No authorities are cited in support of this contention.

There are plenty of authorities to the effect that it was not necessary for defendant to be present when preliminary motion was heard or ruled on.

Snyder vs. *Commonwealth of Massachusetts*
291 U.S. 97 — 90 A.L.R. 575
U.S. vs. *Lynch* — 132 Fed. 2nd. 111

We quote the following from the opinion in the Snyder case supra:

> "No where in the decision of this court is there a dictum, and still less a rule, that the 14th Amendment assures the privilege of presence when the presence would be useless or the benefit be a shadow."

The fact that Appellant appeared with counsel at the time set and entered his plea of guilty would constitute a waiver of any right he might have had to have been present at the time of the setting. At the time Appellant entered his plea it was apparent from the record that he should have been fully aware of the seriousness of the charge against him and certainly his counsel was also charged with notice. This is also very apparent from the record made at the time of passage of sentence. We quote from the statement made by the Court in the presence of the defendant and his counsel,

> "He has been charged with a very serious offense . . ."

While this statement was made to the co-defendant, it was immediately followed by the Court addressing the Appellant. (T.R. 42). At this hearing the Court

also mentioned kidnapping. After passing sentence on Appellant the Court stated,

> "Now that may not mean anything. You will probably be out some other time kidnapping somebody else or violating some other law."

In taking into consideration the foregoing and the entire record, the Appellant must have known that he was entering a plea of guilty to the second count of the indictment charging him with the transportation of a kidnapped person and his plea of guilty admitted the truth of whatever was sufficiently charged in the indictment and waived all defenses other than that the indictment charged no offenses.

Forthoffer vs. *Swope*
103 Fed. 2nd. 707 (9th Cir.)

Kachnic vs. *U.S.* — 53 Fed. 2nd. 312.
79 A.L.R. 1366 (9th Cir.)

U.S. vs. *Otto* — 54 Fed. 2nd. 277

Appellant cites *Nicely* vs. *Butcher* — 81 W. Va. 247, and quotes part of the opinion. (Appellant's brief, Page 11).

Certainly the plea in this case was made by a person of competent intelligence, freely and voluntarily. Had Appellant entered his plea of guilty on his first appearance in Court, there might be some slight grounds for contending that he did not do so with full understanding of the nature and effect. In the present case, Appellant first entered a plea of not guilty, later and with aid of counsel, this plea was withdrawn and the plea of guilty entered. The record heretofore quoted clearly indicates that the Court and everyone present knew what Appellant was pleading to.

POINT 2.

WAS THE APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

The counsel appointed by the Court was a member of the Bar of Arizona and according to the record had practiced law two years in Chicago before coming to Arizona. He was present with the Appellant at every important step in the proceedings. The situation here is entirely different from a case where the defendant stands trial and it clearly appears from the record that counsel was incompetent and did not protect his client's rights. We have nothing in this record showing incompetency on the part of counsel except the unsupported statement of Appellant, nor does it appear in the record that there is anything more that could have been done for the Appellant. Therefore, the authorities cited by counsel are not in point and his contention is without merit.

POINT 3.

DID THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA HAVE JURISDICTION OF THE OFFENSE ALLEGED IN THE SECOND COUNT?

In support of this point the Appellant relies almost solely upon his Memorandum of Points and Authorities accompanying his petition for release quoted in Appellant's brief on Page 14.

Appellant's argument in this case is based on the false premise that Appellant was charged with the crime of kidnapping. Section 408a of Title 18 U.S.C., which is the statute upon which the second count of the indictment was based, does not describe the crime of kidnapping. The reading of the first few lines of the

section is sufficient to show that the crime charged is that of transporting a person who had been unlawfully seized or kidnapped. Under this section no Federal offense was committed until there has been a transportation in interstate commerce, and therefore there was no Federal violation until the victims in this case were transported into the State of Arizona from the State of Nevada. The crime, therefore, having been committed in the State of Arizona, was properly prosecuted in this jurisdiction.

Section 3237, Title 18, U.S.C.*
The above section, which is a 1948 revision of a former section, completely answers this point.

It has been a universal practice in cases of this kind to prosecute either in the jurisdiction of the state where the transportation started or in the jurisdiction into which the victims were transported.

Gooch vs. *U.S.* — 297 U.S. 124

The above case was one of the earliest prosecutions based upon the section of this statute with which we are concerned. The victims, who were officers of the law, were kidnapped in Texas and transferred to Oklahoma. The prosecution was in Oklahoma and the death penalty was imposed. There are many other authorities in support of this position.

Chatwin vs. *U.S.* — 326 U.S. 455-464
U.S. vs. Baker — 71 Fed. Supplement 377

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* Offenses begun in one district and completed in another.

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, c. 645, 62 Stat. 826.

We quote the following from Page 464 in the opinion in the Chatwin case:

"In short, the purpose of the Act was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind."

We also quote from the sylabus in the Baker case,

"The statute punishing one who transports kidnapped persons was designed to punish one guilty of the transporting of the kidnapped persons in interstate commerce . . ."

POINT 4.

WAS THE JUDGMENT AND SENTENCE IMPOSED BY THE COURT VOID BECAUSE OF INDEFINITENESS, AMBIGUITY AND UNCERTAINTY?

Under this point the Appellant again relies upon the Memorandum of Points and Authorities submitted in support of his motion for release, Page 16 —

"The Court stated in its judgment the following:

'THE COURT: *Well, he will be sentenced by this Court to serve 20 years on this charge.*'

But that was all."

However, the quotion in Appellant's brief is not all that was said at the time of sentence. We respectfully call the Court's attention to remarks of the Court. (T.R. 42).

"THE COURT: He has been charged with a very serious offense in this Court. It is just an accident he is not here awaiting sentence to be executed. He is very lucky. He will be committed for nine years."

While it is true that this was addressed to the co-defendant, the statement was made in the presence of the Appellant.

We also quote further remarks of the Court. (T.R. 43).

> "THE COURT: Well, he will be sentenced in this Court to serve 20 years on this charge. Now, that may not mean anything. He probably will be out some other time kidnapping somebody else, or violate some other law. That is the Court's judgment."

We are unable to discover anything indefinite or ambiguous about the sentence in this case.

We have no quarrel with the principal of law that a prisoner is entitled to release when he has served his time less deductions for good conduct. The authority cited in Appellant's brief (Page 12) goes no further than this.

We, therefore, submit that there is no merit to any of Appellant's contentions and judgment of the District Court should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney
for the District of Arizona